No. 3987

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

E. M. HOOVER, as Trustee of the Jordan Valley Land & Water Company, a bankrupt, and T. H. WEGENER, as Trustee of the Jordan Valley Farms, a bankrupt,
Appellants,

vs.

MORTGAGE COMPANY FOR AMERICA,
Appellee.

BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Oregon.

RICHARDS & HAGA
and
C. E. WINSTEAD,
Solicitors for E. M. Hoover, Trustee, etc.,
Residence: Boise, Idaho.

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STATEMENT OF THE CASE

This appeal is from an order made on July 14, 1922, and an order made on November 3, 1922, by the District Court, by the first of which the Court fixed the compensation of J. Humfield, Receiver, and of his counsel, and approved certain disbursements of the Receiver and directed that the amount so due for services and disbursements should be a lien upon the property of the bankrupts and that possession thereof should not be turned over to the Trustees in bankruptcy until the amount so found due the Receiver

and his counsel had been paid. By the second order—dated November 3, 1922—the Court directed the Receiver to sell the property of the bankrupts upon which it had impressed a lien by the order of July 14th. There is no controversy over the facts.

The Jordan Valley Land & Water Company, a Nevada corporation, was adjudged a bankrupt on March 10, 1922, and the Jordan Valley Farms, an Idaho corporation, was adjudged a bankrupt on March 11, 1922, by the United States District Court for the District of Idaho on the petition of unsecured creditors of the two corporations. At the time the corporations were adjudged bankrupts, certain property belonging to them was held by one J. Humfield, General Managing Agent of Appellee, as Receiver appointed in a suit to foreclose a pledge, pending in the District Court for the District of Oregon, wherein the Mortgage Company for America was plaintiff and the Jordan Valley Companies were defendants, but such foreclosure suit or pledge did not include the property in the possession of the Receiver and upon which the lien was impressed by the order of July 14th.

The facts stated chronologically and more in detail are substantially as follows:

The Jordan Valley Land & Water Company was engaged in the construction of an irrigation system in Malheur County, Oregon, and in connection with the sale of water rights in such irrigation system it took in part payment therefor notes from land owners, secured by mortgages on the lands to be irrigated from such irrigation system. The Jordan Valley Farms was

associated in the enterprise. In 1919 and 1920 the Jordan Valley Companies borrowed from the Mortgage Company for America approximately $82,000, giving their joint and several promissory notes therefor, and as security for the payment of these notes they pledged as collateral a number of notes of land owners under the irrigation system of the Jordan Valley Land & Water Company, which collateral notes were in turn secured by farm mortgages. The aggregate amount of the notes and mortgages so pledged with the Mortgage Company for America as security for the notes of the Jordan Valley Companies was considerably in excess of the amount borrowed from Appellee. (Rec. pp 11 & 20)

In September, 1921, Appellee brought suit to foreclose its pledge and in the Bill of Complaint it alleged in substance that the security (farm mortgages) which it held would be depreciated and impaired unless a receiver was appointed to operate the irrigation system so that water could be delivered to the lands embraced in such farm mortgages. Appellee claimed no lien upon the irrigation system, but it demanded the appointment of a receiver for the protection of its collateral security.

The Court accordingly appointed, on September 29, 1921, J. Humfield, general managing agent of Appellee, Receiver of the irrigation system. While the order appointing the receiver is somewhat broader than the allegations and prayer of the complaint, the Receiver is nevertheless a Receiver *pendente lite* for the purpose of protecting a secured creditor and the estate upon which it was foreclosing, viz: The mortgages given by the farmers and pledged with Appellee.

On March 10th and 11th, the Jordan Valley Land & Water Company and the Jordan Valley Farms were respectively declare bankrupts by the District Court for Idaho on the petition of unsecured creditors, and E. M. Hoover was elected trustee by the creditors of the Jordan Valley Land & Water Company, and T. H. Wegener was elected trustee by the creditors of the Jordan Valley Farms.

Thereafter, and on April 20th, the District Court for Oregon entered its decree in the foreclosure suit brought by Appellee. The decree makes no reference to the Receiver which had been appointed on September 29, 1921, but it finds the amount due Appellee under the several notes of the Jordan Valley Companies and directs the sale of the collateral unless the amount due is paid within ten days. The decree also directs that the proceeds from the sale of the collateral securities pledged with Appellee shall be applied "first, to the payment of the expenses, costs and disbursements of this proceeding and said solicitor's fees, and next to the payment of the amounts decreed due upon the promissory notes described in plaintiff's first cause of suit" (Rec., p. 34).

The Master in Chancery was directed to sell the collateral and carry out the terms of the decree.

The Trustees in Bankruptcy in due course made application to the District Court of Oregon to direct the Receiver to deliver to the Trustees respectively such of the properties of the bankrupt as were in his possession.

On July 14, 1922, these applications, together with the application of the Receiver, J. Humfield, for the

approval of his accounts and for fixing the compensation of himself and his counsel came on for hearing. The Trustees filed answer to the petition of the Receiver and denied the liability of the estate of the bankrupts for such charges on the ground, among others, that such Receiver was acting solely in the interest of the plaintiff (Appellee) in the foreclosure suit, and not for the benefit of general creditors. It appears from the record (Rec., pp. 82-100), that the Jordan Valley Irrigation District had been organized to acquire the water right mortgages and the irrigation system, and that immediately prior to the hearing in Court on July 14th the representatives of the District agreed to pay as part of the purchase price of the water right mortgages which Appellee had purchased at the Master's Sale the amount claimed by J. Humfield as Receiver, and in view of this mutual agreement between the Receiver and the Irrigation District, counsel for the Trustees in bankruptcy, made no contest before the Court on the petition of the Receiver and no evidence was introduced upon the hearing, but the order of July 14th was made upon the consent of counsel but without any authority so to do from either the creditors or the Bankruptcy Court. What followed is set out in the affidavits of the Trustees and counsel who participate and submitted in opposition to the petition of Appellee to sell the assets held by the Receiver and not included in the pledge. It should be stated that Appellee claimed it had paid the allowances made to the Receiver and his counsel and that it was accordingly subrogated to the Receiver's lien.

Whether the Irrigation District failed to pay the amount allowed by the order of July 14th because of a collusive agreement with the Receiver or Appellee, or for some other reason, must perhaps be determined from the showing made by the Appellants on the hearing of the petition to sell, if it becomes important in the determination of this appeal. However, neither the creditors nor the bankruptcy Court or Referee ever approved the pretended compromise on which the order of July 14th rests. But the District Court for Oregon on November 3rd, 1922, made an order in the foreclosure suit directing the sale of the properties of which the Receiver had taken possession, although not included in Appellee's lien.

From the orders referred to, Appellants have appealed to this Court, claiming in substance that they are entitled to the possession of the property under the Bankruptcy Law free of the lien attempted to be created against the same in favor of the Receiver.

SPECIFICATION OF ERRORS

The errors relied on are set forth in considerable detail in the Assignment of Errors, pages 113 to 117 of the record on appeal. Stated generally they are:

1. That the Court was without jurisdiction, power, or authority to appoint a Receiver in said cause over property not included in the security held by Appellee.

2. Because the Court erred in ordering, directing or providing in the said order of July 14th, 1922, that the said Appellee or J. Humfield as Receiver should retain possession of all assets belonging to the

estates of said bankrupts until the allowances made on account of fees and disbursements had been fully paid and satisfied.

3. Because the Court erred in making any allowance for fees or compensation to said Receiver or to his counsel, and in approving the claims and accounts of said Receiver without hearing any evidence and without any information as to the reasonableness thereof, or the value of the services of either the said Receiver or his counsel, or as to the correctness of said accounts.

4. Because said order is based in part if not entirely upon an assumed consent or stipulation of counsel for appellants, who were without authority to make any agreement, stipulation or consent that would bind the creditors of the said Jordan Valley Land & Water Company and the said Jordan Valley Farms, represented by the Trustees in Bankruptcy.

5. Because the Court erred in not granting the petition of Appellants praying and petitioning that the said J. Humfield as Receiver in said case be required to turn over and deliver to them all the assets in his possession as such Receiver, or otherwise, belonging to the said bankrupts.

6. Because the Court erred in making and entering the order dated on or about the 3rd day of November, 1922, directing or authorizing the said J. Humfield as receiver to sell all the assets of the said Bankrupts to satisfy his alleged lien for the amount claimed to be due him under the said order of July 14th, 1922, for his alleged services and for the services of his counsel and on account of alleged disbursements.

7. Because the Court erred in holding and deciding that the showing made and proof submitted on or about the 30th day of October, 1922, in this cause, against the making of the order dated November 3rd, 1922, was insufficient and inadequate to prevent the sale of the said property to satisfy said alleged lien in favor of said Receiver.

8. Because the Court erred in not vacating and setting aside the said order of July 14th, 1922, in view of the showing made and proof submitted at the hearing held on or about the 30th day of October, 1922, in said cause.

9. Because the Court erred in not holding and deciding that your petitioners and their counsel and solicitors were without power or authority under the Bankruptcy Act without first having obtained the approval of the creditors of said Bankrupts and their consent thereto, to enter into any agreement such as is referred to in the said order of July 14th, 1922.

10. Because the Court erred in making the order of July 14th, 1922, fixing the compensation of the Receiver and his counsel and allowing and approving the accounts of said Receiver, without any proof or evidence either as to the extent or nature of the services rendered by said Receiver and h's counsel or the reasonable value thereof, or as to the correctness of said accounts or as to whether such accounts were rendered in connection with a proper discharge of the duties of such Receiver, but said order was apparently entered and based upon the consent of counsel for the trustees in bankruptcy, which in turn was based upon an agree-

ment between the Receiver and said plaintiff and the Jordan Valley Irrigation District that the latter would pay all such charges and expenses, and that the same would not become a claim or charge against the estate of said bankrupts; that said Appellee and the Receiver and the said Jordan Valley Irrigation District are now conspiring and confederating together not to carry out said agreement, but to defraud the creditors of said bankrupts by selling all the assets of whatsoever kind and nature of said bankrupts to pay the amounts so fixed and allowed by the said order of July 14th, 1922, which said claims have never been approved by the Bankruptcy Court or the creditors of said bankrupts or the referee in bankruptcy, but have been expressly repudiated by said creditors and referee in bankruptcy since the making of the order of November 3, 1922.

11. That the amount allowed by said order of July 14th, 1922, to said Receiver and his counsel and the allowances made the Receiver on account of disbursements are excessive and exorbitant and are grossly in excess of the reasonable value of the services rendered by the Receiver and his counsel, and the disbursements of the Receiver allowed by said order are excessive and exorbitant and were not incurred in the reasonable discharge of the duties of said Receiver.

BRIEF OF THE ARGUMENT

The Court was without jurisdiction to appoint Receiver for property not covered by the lien which Appellee was seeking to foreclose.

An Alien cannot maintain a suit in the Federal Court for Oregon against two defendants, one of which is a citizen and inhabitants of Nevada and the other a citizen and inhabitant of Idaho.

Sec. 2, Article III, U. S. Constitution.
The Judicial Code, Sec. 24.
In re Hohorst, 150 U. S. 654, 37 L. Ed. 1211.
Galveston & C. Co. vs. Gonzales, 151 U. S. 496 38 L. Ed. 248.

The Court was without jurisdiction to appoint a receiver to take charge of property which was not involved in the litigation and upon which Appellee claimed no lien.

Thomas vs. Armstrong (Okla.), 151 Pac. 689, L. R. A. 1916B ,1182.
Smith vs. McCullough, 104 U. S. 25, 26 L. Ed. 637.
Wormser vs. Merchants' Nat. Bank, 49 Ark. 117, 4 S. W. 198.
Staples vs. May, 87 Cal. 178.
Bowman vs. Hazen, 69 Kan. 682, 77 Pac. 589.

"When a bill is filed to foreclose a mortgage, the Court may, upon a proper showing, appoint a receiver to take into his possession and control the mortgaged property. But the jurisdiction possessed by a Court of Chancery to foreclose a mortgage and appoint a receiver for the mortgaged property pending the foreclosure gives it no jurisdiction or power to seize or take into its custody

or control, through a receiver or otherwise, property of the debtor which is not covered by the mortgage. Nor can the Court in such a suit rightfully make any order that will prevent, hinder or delay the other creditors of the mortgagor from subjecting property not included in the mortgage to the payment of their debts."

Scott vs. Trust Co., 16 C. C. A. 358, 69 Fed. 17.
Central Trust Co. vs. Worcester Etc. Co., 114 Fed. 659.
Tyler vs. Hamilton, 62 Fed. 187.

The orders of the Court appointing a receiver and stating his duties and powers should have due regard to the purpose of a receiver in a foreclosure action, namely, to protect the right of the mortgagee, to obtain payment of his debt from the *mortgaged property*, and they should not extend beyond the lien of the mortgage so as to embarrass other creditors in the collection of their claims.

Wormser vs. Merchants Nat. Bank, 49 Ark. 117, 4 S. W. 198.
1 Tardy's Smith on Receivers, p. 586.

H. Humfeld, General Managing Agent of plaintiff in foreclosure suit, was appointed receiver in aid of plaintiff and for the protection of the property covered by the mortgage. He cannot urge that he was acting for other creditors, secured or unsecured. Manifestly, his relation to plaintiff would have disqualified him as a general receiver.

Plaintiff (Appellee) was foreclosing only upon a pledge of choses in action which were in its possession and in such cases there is no occasion for a receiver, unless it be to collect the securities pending the litigation, and that plaintiff had the right to do as pledgee and assignee of the securities.

It was the duty of the Receiver to deliver to the trustees in bankruptcy all property in his possession not covered by plaintiff's lien.

If the suit is a foreclosure suit or other suit in equity not creating a lien, but simply enforcing it, and the receiver therein does more than simply conserve the assets subject to the lien and seizes other assets, although doing so by authority of the state law, the possession of the State Court will be protected as to the assets covered by the lien, but will be superseded as to the remainder.

2 Remington on Bankruptcy, Sec. 1587.

A receiver or trustee, when appointed in the bankruptcy proceeding, while not entitled to the mortgaged property, will be entitled to any excess arising from the foreclosure sale when made by order of the State Court after payment of the mortgage and costs of foreclosure.

The jurisdiction of the Courts of Bankruptcy in the administration of the affairs of insolvent persons and corporations is essentially exclusive and receivers appointed by other Courts should immediately turn over the property to the trustee in bankruptcy.

1 Clark on Receivers, p. 443.

In re Watts, 190 U. S. 1, 47 L. Ed. 933.

In re Diamond's Est., 259 Fed. 70.
Hume vs. Myers, 242 Fed. 827.

The operation of the bankruptcy laws cannot be defeated or embarrassed by special receivers appointed in aid of secured creditors.

The District Court for Oregon could not impress a lien on the unincumbered assets of the bankrupts for the payment of the costs and fees of a receiver appointed in aid of a secured creditor having a lien on other assets for the protection of which the receiver was appointed.

> "When a Court of Equity appoints receivers of corporate property, its allowance to its receiver and their attorney is an administrative order, presumptively right as to the justice of the allowance. When the property falls by operation of law into the Bankruptcy Court, that Court by comity will indulge the presumption in favor of the correctness of the allowance, but the Court of Bankruptcy, having the responsibility of administration, must exercise its independent judgment, giving due weight to the presumption in favor of the administrative finding of the Court of Equity."

Hume vs. Myers (C. C. A., 4th Cir.), 242 Fed. 827, 830.

In re Diamond's Estate (C. C. A., 6th Cir.), 259 Fed. 70.

In re Watts, 190 U. S. 1.

In re Neuberger (C. C. A., 2nd Cir.), 240 Fed. 947.

Hanson vs. Stephens, 116 Ga. 722.

2 Remington on Bankruptcy, 1513.

A mortgagee who obtains the appointment of a receiver in aid of its foreclosure proceedings and for the protection of the assets covered by its lien, is not entitled to a prior lien upon the unincumbered assets of the mortgagor for its disbursements in connection with the receivership proceeding. In such cases the fees and compensation of the receiver and his counsel and the disbursements of the receiver are a charge upon the estate covered by the mortgage and may be included in the judgment against the mortgagor, but such expenses do not become a lien on other property of the mortgagor, except as a deficiency may be entered after the sale of the mortgaged property.

The Receiver in this case did not pretend to render any service for the benefit of the unsecured creditors or add to the value of the unincumbered estate, but several months after the mortgagors were adjudged bankrupts he is awarded, by the Court that appointed him, a prior lien upon the estate of the bankrupts that was unincumbered when they were adjudged bankrupts and the lien is for services rendered at the instance and for the benefit of a creditor having security on other property. Under the authorities cited, the District Court was without jurisdiction, power or authority to so embarrass the administration of the bankruptcy law.

It may be argued that counsel for the trustees consented to the order of July 14th, 1922, but their acquiescence in the agreement of the Irrigation District to pay the receiver's charges and expenses was given under circumstances as shown by the affidavits and

petitions in the record (pp. 82 to 100) that would in no event make such consent binding upon the trustees or the unsecured creditors.

The authority of counsel for the trustees in bankruptcy to create or consent to the creation of prior liens against the estate of the bankrupts cannot exceed the power of the trustees themselves in such matters, and it is well settled that trustees have no such power.

Section 27 of the Bankruptcy Act provides:

> "The trustee may, with the approval of the Court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate."

General Order 35 provides:

> "Whenever a trustee shall make application to the Court for authority to submit a controversy arising in the settlement of a demand against a bankrupt's estate, or for a debt due to it, to the determination of arbitrators, or for authority to compound and settle such controversy by agreement with the other party, the application shall clearly and distinctly set forth the subject-matter of the controversy ,and the reasons why the trustee thinks it proper and most for the interest of the estate that the controversy should be settled by arbitration or otherwise."
>
> "Any compromise proposed by the trustee under Section 27 should be submitted to the creditors in accordance with Section 58 (7); and the action of the creditors thereon under Section 56 is

not absolutely conclusive, but may for good cause be disallowed by the Court under Section 27."

In re Heyman, 108 Fed. 207.
1 Collier on Bankruptcy, pp. 613-615.
In re Baxter, 269 Fed. 344.
In re Stier March Contracting Co., 245 Fed. 223.
In re Prudential Outfitting Co., 250 Fed. 504.
In re No. Hampton Portland Cement Co., 185 Fed. 542.

From the filing of the petition in bankruptcy the jurisdiction of the Bankruptcy Court is exclusive and the estate is regarded as in *custodia legis,* provided an adjudication is ultimately made.

Acme Harvester Co. vs. Beekman Lbr. Co., 220 U. S. 300, 56 L. Ed. 208.
U. F. & G. Co. vs. Bray, 225 U. S. 205, 56 L. Ed. 1055.
In re Diamond's Estate, 259 Fed. 70.

Manifestly there could be no dual administration of the affairs of the bankrupts—partly by the Receiver of the District Court for Oregon in the foreclosure suit, and partly by the Bankruptcy Court for Idaho, and it was the duty of the District Court for Oregon to direct its Receiver to turn over the assets, not covered by Appellee's lien, to the trustees in bankruptcy. There is no basis for the assumption that if the Receiver had a valid claim against the bankrupts, rather than against the mortgagee for whom he acted as Receiver, the Bankruptcy Court would not deal justly and fairly

with the Receiver for any service he had rendered and adjust his priority according to both law and equity.

ARGUMENT

Jurisdiction of Cause

Did the Court have jurisdiction of the cause so that it could appoint a Receiver or enter any valid order binding upon the parties or their successors, or upon the trustees in bankruptcy? It is alleged in the bill of complaint (Rec., p. 4), that Appelle is an *alien* and that the Jordan Valley Land and Water Company is a *Nevada* Corporation and the Jordan Valley Farms an *Idaho* Corporation, but the suit is brought in the District of *Oregon.*

We think there are a number of other grounds upon which this Court must hold that the District Court was without power or authority to impress a lien upon the estate of the Bankrupts in favor of the Receiver in the foreclosure suit and to require the payment thereof before it would permit the delivery of the estate of the Bankrupts upon which Appellee had no lien under its mortgage, to the trustees in bankruptcy, and, if so, it may not be necessary for the Court to pass upon the question of jurisdiction.

Section 2 of Article 3 of the Constitution, among other things, provides:

> "The judicial power shall extend to all cases in law and equity, arising under this Constitution, * * * between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between *a*

state, or the citizens thereof, and foreign states, citizens or subjects."

Paragraph 1 of Section 24 of The Judicial Code is to the same effect.

Under the plain language of the Constitution and Statute, the judicial power of the courts of the United States is in such cases limited to controversies between an alien and the citizens of *a* state. Can this be extended to embrace controversies between an alien and the citizens of several states, sued in a state of which none of the defendants are citizens?

Attention is called to the decisions of the Supreme Court of the United States in Galveston, Etc. Co. vs. Gonzales, 151 U. S. 496, 38 L. Ed. 248 and in re Hohorst, 150 U. S. 654, 37 L. Ed. 1211, and to the decision of the Court of Appeals of the Second Circuit in Vidal vs. So. Am. Securities Company, 276 Fed. 855. The reason assigned by the Court in Barrow Steamship Co. vs. Michael Kane, 170 U. S. 100, 111, 42 L. Ed. 964, 968, for the Federal Courts having been invested with jurisdiction, does not exist in the case at bar.

If the Court was without jurisdiction of the cause, then, manifestly, it had no right to either withhold possession through the receiver or to impose conditions before it would deliver possession to the trustees in bankruptcy.

H. Humfield was a receiver pendente lite in aid of plaintiff in the foreclosure suit.

With the securities held by Appellee under its pledge were shares of stock in the Jordan Valley Water Com-

pany appurtenant to the lands described in the mortgages pledge with Appellee and evidencing the right of such lands to receive water from the irrigation system constructed by the Jordan Valley Land and Water Company (Rec. pp. 6-7). Appellee had possession of the collateral. It is alleged (Rec. p. 11):

> that each and all of the aforesaid collateral securities, mortgages and certificates of stock of the Jordan Valley Water Company are now in the possession of the plaintiff corporation at the City of Portland in the State of Oregon * * * and are subject to the jurisdiction of the above entitled court for the purpose of the foreclosure of the lien of the plaintiff thereon as expressly provided in the said memorandum of agreement."

> Appellee further alleges (Rec. p. 12, Par. XVI):

> "that the lands covered by the collateral mortgages so assigned to plaintiff as security for said indebtedness are all under said irrigation project and dependent upon water therefrom for the successful cultivation of said lands and the production of crops thereupon, and if deprived of water, said lands will be of little value and great loss and suffering will be caused to the settlers owning and cultivating said lands, and the value of plaintiff's collateral security for said indebtedness will be greatly depreciated."

Appellee then alleges that a receiver is necessary in order that water may be delivered to the lands embraced

in the mortgages which it holds under its pledge and the prayer is (Rec. p. 23, par. 3):

> "That a receiver be appointed by the Court to take charge of the property and assets of each of the defendants and *in the disposition of this suit,* and that said receiver be authorized to operate the irrigation system of the Jordan Valley Land and Water Company by the order of the Court."

H. Humfeld, General Managing Agent of Appellee and the party that had made the loan and that was responsible for its collection, was thereupon appointed Receiver (Rec. pp. 97-98). The order provides (Rec. p. 25) that:

> "the said Receiver is ordered and directed to maintain the irrigation system of the defecdant Jordan Valley Land and Water Company and to operate the same, to the end that the mortgagors referred to in the bill of complaint, and their successors in interest, may have the water to which they are entitled, and *to the end that the securities listed in the bill of complaint may be preserved and protected from destruction in value.*" (Our italics.)

It cannot be successfully contended that Humfeld was a general receiver. He was the managing agent of the foreclosing plaintiff and no unsecured creditor was a party to the suit and clearly no court would for a moment consider appointing a foreclosing plaintiff a general receiver. As said by the Supreme Court in Smith vs. McCullough, 104 U. S. 25:

"Notwithstanding the broad terms of the order appointing him, we are satisfied that the Court had no purpose to appoint him receiver of any property except that covered by the mortgage."

See also Scott vs. Farmers Loan & Trust Co., 16 C. C. A. 358, 69 Fed. 17 and authorities cited in the Brief of The Argument.

We have here, however, a most unusual situation: at the instance of the foreclosing plaintiff and in aid of the foreclosure suit, his general agent is appointed Receiver of property not covered by the mortgage, thus taking the security away from the unsecured creditors and giving it to one that is already secured and charging the expense of the "operation" to the unsecured creditors.

We think the rule is that a mortgagee who obtains the appointment of a receiver in aid of his foreclosure suit and for the protection of the assets covered by his lien is not entitled to a receiver for the unincumbered assets of the mortgagor or a lien upon them for the expenses of the receivership proceedings. In such cases the fees and compensation of the receiver and his counsel and the disbursements of the receiver having been incurred for the benefit of the plaintiff in the foreclosure suit they should be added to the amount due plaintiff under his contract lien and included in the judgment against the mortgagor, and if the property covered by the lien is insufficient to meet the total charge, then the deficiency judgment as in other cases can be made a lien upon other property of the mortgagor.

The Receiver in this case did not pretend to render any service for the benefit of the unsecured creditors or add to the value of the estate not covered by the mortgages pledged with Appellee. The Receiver says in his application for the allowance of his compensation and expenses (Rec. pp. 47-48):

> "That because of the efforts of your petitioner (H. Humfeld, Receiver) the system has been maintained intact and the value of the farming land under the ditch has not been lost. That the land under the ditch is for the most part covered by mortgages pledged to plaintiff and for the foreclosure of which this suit is brought. That while the receivership has preserved a most valuable asset of the Jordan Valley Land and Water Company for the benefit of that corporation and for its creditors, it *has also been effectual in preserving the value of the lands which are pledged to plaintiff through the mortgages described in the complaint and which plaintiff has purchased at foreclosure sale held on the 23d day of June.*"

In other words, Appellee having obtained the benefit of the receivership and had its security enhanced through the efforts of the receiver, forecloses its pledge, buys in the security and leaves the receiver to collect from the unsecured creditors the entire cost of the proceedings instituted by Appellee and for Appellee's benefit and the Court makes the charge of the receivership a prior lien against the estate of the bankrupts and under the order of November 3, 1922 (Rec. pp.

102-103) it directs the receiver to sell the property without regard to the bankruptcy court or the trustees in bankruptcy or the unsecured creditors. If that order had not been stayed by the appeal, it would have effectually disposed of the estate of the bankrupts and the unsecured creditors would not have received a dollar, but the entire estate would have been exhausted in giving aid and the benefit of a receiver to appellee,—a secured creditor who had a lien on only a part of the estate.

The Supreme Court of Oklahoma in Thomas vs. Armstrong, 151 Pac. 689, L. R. A. 1916B, 1182, in passing on a receivership in aid of foreclosure says:

> "In deciding the remaining question, we are assuming, without deciding, that the court has power to appoint a receiver under the facts in this case, but, granting this, did it have power to appoint a receiver for all the property of the defendants within this state, when the property involved in the litigation was an undivided one-half interest? We think not. The court was without jurisdiction to appoint a receiver to take charge of property which was not involved in the litigation. (citing authorities.)
>
> "Had this been a foreclosure of his lien in an equitable action, the court could only have appointed a receiver for the property embraced in the mortgage. (citing a number of cases.)"

High on Receivers, Sec. 378 (4th Ed.) says:

> "Proceedings for the appointment of Receivers, in action for the foreclosure of railway mortgages

> are regarded as *in rem,* to the extent that they seek to reach such property of the corporation as was mortgaged to secure the bondholders. And the right of the receiver to the possession of the corporate property, being subject to the same limitations governing the rights of the mortgage bondholders in whose behalf he was appointed, extends only to the specific property which is the subject of the litigation and covered by the mortgage."

To the same effect is 1 Clark on Receivers, Sec. 47

The Court, therefore, not only had no authority to charge to the general creditors, the expense of a receivership for the benefit of the foreclosing plaintiff, but it had no authority to appoint a receiver for property not involved in the foreclosure suit. We have here the anomalous situation that the foreclosing plaintiff concluded its foreclosure suit, took the benefit of the receivership proceedings, sold the pledged assets and went its way, but left the receiver, with his claim for services and disbursements made for plaintiff's benefit, to collect from the unsecured creditors, or the estate of the bankrupts without regard to the proceedings in bankruptcy and without filing or submitting his claim to the bankruptcy court where it might be allowed if he could show that his services and disbursements had been of substantial benefit to the estate.

The operation of the bankruptcy law cannot be defeated or embarrassed by special receivers appointed at the instance of secured creditors and for their special benefit. The jurisdiction of the bankruptcy court is

essentially exclusive and receivers appointed by other courts should immediately turn over the property to the trustee in bankruptcy.

The authorities on these propositions are cited in the Brief of the Argument and we shall not encumber the brief by repeating them here.

Controversies of this character have nearly always arisen between receivers appointed in the state courts and the trustees in bankruptcy and while the state courts have frequently been jealous of their jurisdiction, they have nevertheless recognized the necessity for an orderly administration of the estates of bankrupts and have yielded to the bankruptcy court the power and right to administer the estate.

The Supreme Court of Georgia in Hanson vs. Stephens, 116 Ga. 722, in passing upon the question says:

> "While a fund raised by the sale of properties of an insolvent debtor through the medium of a receiver under the orders of a state court may on the application of a trustee, appointed after an adjudication of such debtor as a bankrupt, for a transfer of such fund in the state court to him be charged with the costs and expenses of converting the property of the debtor into cash, yet after the property of the debtor has been seized under the order of a state court and placed in the hands of a temporary receiver, and after the adjudication of such person as a bankrupt and before the conversion of his property into cash has been made by the receiver, the trustee, on application to the state court is entitled to possession of the property for

> the purpose of being sold and administered in the court of bankruptcy. And it is error on the part of the judge of the state court to order the transfer of such property to the trustee on condition that the fees for the attorney and receiver shall be first paid. 'When no fund is in the hands of the receiver out of which such payments can be made, the persons claiming to be paid out of the property must be remitted to the bankruptcy court for the adjudication and establishment of their respective claims.' "

The Circuit Court of Appeals for the Fourth Circuit in Hume vs. Myers, 242 Fed. 827, in a controversy between a receiver of one federal court and the trustee in bankruptcy of another federal court, in respect to the payment of receivership expenses and fees, says:

> "It is true that in many of the cases broad language is used in favor of the authority of courts to fix the compensation of their officers; but these cases related to allowances and payment from funds in hand, not to fixing charges upon specific property to be turned over to the bankruptcy court. (citing authorities) When the court of equity has not reduced the property to money, it is not in possession of that definite knowledge of the value of the property which is an important factor in finally fixing compensation.
>
> "Any real services, either of an assignee under a deed of assignment or of a receiver acting under judicial authority, will be allowed as a preferred

claim in the administration of the property and the distribution of its proceeds to the extent that the services have benefited the estate. Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165. But orders for such allowances are purely administrative, subject to entire disallowance or change by either increase or decrease with the development of the administration. The order of Judge Waddill of the Eastern District making allowance to the Receivers was purely administrative. It was subject to change at his discretion at any time at least before actual payment, as long as he had the responsibility of administration. When the responsibility of administration fell upon Judge McDowell, with it came the power to exercise the same discretion. The point of logical contradiction, not to say absurdity, is reached when it is said that an allowance which Judge Waddill could have revoked, or increased or diminished, at his discretion, attached to the property as it passed to the bankruptcy court as an unalterable judgment beyond the control of the judge of the bankruptcy court.

"The true rule is this: When a court of equity appoints receivers of corporate property, its allowance to its receivers and their attorney is an administrative order, presumptively right as to the justice of the allowance. When the corporate property falls by operation of law into the bankruptcy court, that court by comity will indulge the presumption in favor of the correctness of the

allowance; but the court of bankruptcy, having the responsibility of administration, must exercise its independent judgment, giving due weight to the presumption in favor of the administrative finding of the court of equity. This, we think, is what the Supreme Court meant in the case of In re Watts, 190 U. S. I, 23 Sup. Ct. 718, 47 L. Ed. 933, when it said:

" 'It has been already assumed that the bankruptcy proceedings operated to suspend the further administration of the insolvent's estate in the state court, but it remained for the state court to transfer the assets, settle the accounts of its receiver, and close its connection with the matter. Errors, if any, committed in so doing, could be rectified in due course and in the designated way.'

"The rectification of errors in due course and in the designated way here referred to must mean rectification by the bankruptcy court, for after the assets are turned over to that court all orders relating to the matter must emanate from that court."

The District Court for Oregon fixed the amount due the receiver and his counsel at approximately $9,100 without knowing whether the entire estate which the receiver was to turn over to the bankruptcy court would sell for even one-half of the amount so allowed. Clearly, if the property which the receiver held was worth only $5,000, the allowance made might well be considered unreasonable for it ought to be the purpose

to so administer an estate that there will be something left for those for whom it is being administered.

The Circuit Court of Appeals for the Sixth Circuit In re Diamond's Estate, 259 Fed. 70, considers at some length and cites many authorities on the power of the bankruptcy court to demand the surrender to it for administration the assets of the bankrupt, although in the possession of a receiver appointed by another court. The court says:

> "The broad question involved is whether the bankruptcy court had power, by summary order, to compel the state court receiver to turn over to the bankruptcy court, to await its action upon the question of compensation, fees and disbursements of that receiver. We think this question must be answered in the affirmative."

The Court then proceeds to examine the authorities and adds:

> "Any other rule would, pro tanto, take the ultimate distribution of the assets of the bankrupt estate out of the hands of the bankruptcy court."

In that case the Supreme Court denied a petition for certiorari.

Frankenstein vs. Jacobs, 249 U. S. 614.

The circumstances under which the order of July 14th was made are fully stated in the affidavits of E. M. Hoover, J. H. Richards, Leslie J. Aker and T. H. Wegener (Rec. pp. 82-100) and the District Court should have set aside that order, but in face of the

showing made it granted the petition of the Appellee for the sale of the property (Rec. p. 81) and made the order of November 3d (Rec. p. 102.)

Clearly, the trustees in bankruptcy and their counsel were without authority to agree to the receiver's charges being made a prior lien upon the estate of the bankrupts; such an agreement was to take the estate from the jurisdiction of the bankruptcy Court and it might exhaust the entire estate and leave nothing for the creditors and such is in fact the effect of the order in this case. Trustees in bankruptcy have extremely limited powers. Their authority in such matters is comparable with that of a guardian *ad litem*. His powers are strictly limited to matters connected with the suit in which he is appointed and his acts with respects to the infant's rights concerning any other matters are unauthorized.

> "The guardian *ad litem* or next friend can make no concessions; he can not waive or admit away any substantial rights of the infant, or consent to anything which may be prejudicial to him; but he may make a valid consent or waiver to matters which merely facilitate a trial and can not prejudicially affect the rights of the infant."
>
> 22 Cyc 663.

A trustee in bankruptcy has no power to compromise claims against the estate without the consent of the creditors and the bankruptcy court.

Sec. 27 of the Bankruptcy Act.

General Order No. 35 and cases cited in support

of this proposition in the Brief of the Argument.

Other questions arising upon the face of the record are discussed in the Brief of the Argument, and, without waiving any of the points there discussed, we submit that the order of July 14th and the order of November 3, 1922, by the District Court for Oregon should be set aside and the Receiver instructed forthwith to surrender the property in his possession belonging to the bankrupts to the trustees in bankruptcy free of the lien attempted to be created for the fees, compensation and disbursements of the receiver and his counsel.

Respectfully submitted,

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